IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 459 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DARSHANSINH TARASINH SHIKH

Versus

STATE OF GUJRAT

Appearance:

MR SATISH R PATEL for Petitioner

MR ST MEHTA, APP for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

and

MR.JUSTICE J.R.VORA

Date of decision: 02/03/2000

ORAL JUDGEMENT : [Per: Shelat, J.]

1. The appellant, who was placed on trial relating to the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (for short "the NDPS Act) and Section 66 of the Bombay Prohibition Act (for short "the Act"), in the court of the Additional Sessions Judge at Nadiad, in Session Case No. 19 of 1994, came to be convicted on 28th February, 1995 and sentenced to rigorous imprisonment for 10 years and a fine of Rs.one lac, in default rigorous imprisonment for one year more. Being aggrieved by such order of conviction and sentence, the appellant, who is the original accused, has preferred this Appeal.

2. Necessary facts may in brief be stated. Mr. Bharatkumar Chimanlal Bhandari, was at the relevant time serving as the PSI, Vidyanagar Police Station. On 22nd July, 1993, PSI, Anand Police Station was on leave. He was, therefore, holding the charge of PSI, Anand Police Station. During night time he had decided to have a patrolling along with the police personnel because he had received the information that certain sardarjees were bringing weapons or were carrying the weapons or concealing the weapons in certain premises for offensive activities because Khambholaj Police Station had seized weapons in bulk from Sardarjees. Mr.Bhandari and his team during the patrolling went to the high-way and searched certain hotels and Dhabas on the road. When he and his team reached near the Chikhodara junction and went into the Rajputana Hotel, he found that the appellant was taking his supper, but seeing him and his team, he in order to escape avoided of being seen moving suspiciously and constricted like a tortoise. He, therefore, smelt a rat. He called him and inquired about his name, address, etc. After interrogation, when his person was searched, from the left pocket of his jacket, some black object was found, which was on smelling later on found to be the lump of opium. Its weight was about 10 grams and value thereof was Rs. 100/-. The panchnama was drawn, opium was seized and sealed in a canister and then taking the signature of the panchas on the slips, the same were tied with the canister wherein the opium was placed. The appellant was arrested. Taking him to the police station, the complaint against him for the aforesaid offences was lodged. After investigation was over, the charge sheet was filed for the aforesaid offences before the Judicial Magistrate (First Class) at Anand. The learned Magistrate of that court was not competent to try the case. He therefore remitted the same to the Court of Sessions for hearing and disposal. The same therefore came to be registered as Session Case

No. 19 of 1994. The then learned Addl. Sessions Judge, Nadiad, then framed the charges at Exh.2 to which the appellant pleaded not guilty. The prosecution in order to establish the charge, led necessary evidence. Appreciating the evidence before him, the learned Addl. Sessions Judge found that prosecution had succeeded in establishing the charge levelled against the appellant. He, therefore, held that the appellant guilty of the aforesaid offences and sentenced him as aforesaid. It is against that order of conviction and sentence, the present Appeal has been filed.

3. The judgment and order of conviction and sentence rendered by the lower court have been assailed on several grounds by the learned Advocate Mr. Gupta, representing the appellant, but during the course of the arguments on a query being made, he submits that he wants to make his submission only on the point of identification. We will therefore deal with the only point raised as it goes to the root of the case and would not dwell upon other points. It is the contention of Mr.Gupta that the prosecution had failed to establish that opium alleged to have been seized from the appellant was sent to the Forensic Science Laboratory for analysis, the same was analyzed, and report produced on record is the report of that opium. When the identity of the opium is doubtful, the conviction cannot be maintained. Learned APP Mr. Mehta in reply to such contention has taken us to the entire evidence on record and tried to convince us that the opium seized from the possession of the appellant was sent to FSL. The same was examined by Chemical Analyzer and report produced on record relates to that opium found from the possession of the appellant. The criminal law does not mandate to favour defence and doubt the prosecution on any frivolous ground or encourage the defence finding fault on guess-work.

4. On perusal of the evidence with meticulous care and finicky details, we find that the prosecution has failed to establish the identity of the opium sent to the Forensic Science Laboratory. Bharatkumar Chimanlal Bhandari, PSI in his evidence at Exh.11 makes contradictory statements with regards to the slips containing the signatures of the panchas. At one stage, he says that the slips containing the signatures of the panchas were placed in the canister along with the opium and thereafter the same was tied with the thread and was sealed with wax. He has also made it clear that thereafter the canister was placed in one cloth bag which was not at all sealed. When again he was asked in the cross examination, he came forward with the case that the

slips were affixed on the cloth bag and no seal was affixed thereon. Thereafter at one stage, he came forward with the case that the slips containing the signatures of the panchas were neither placed in the canister nor affixed on the bag, but were simply placed on the canister after it was sealed and placed in the cloth bag. Krushna Shankar Jagajivan Ram was at that time serving as First Grade Constable. According to him, the slips were placed in the canister and thereafter the canister was sealed. A panchnama (Exh.12) was drawn at the spot wherein also the fact about sealing of the mudammal is stated. As per that panchnama, the opium was placed in the canister. The same was sealed and placed in the cloth bag and thereafter the slips containing the signatures of the panchas were tied with thread; and again second seal was affixed thereon. The Laboratory has also stated in what condition it received the mudammal. The letter of the Forensic Science Laboratory is produced at Exh.16, which shows that it received the packet in sealed condition, but the description thereof given is material. The laboratory received the same in white paper parcel containing a panparag tin box, from where a small plastic sheet, was found about which, the Police Officer and panchas are silent. It may be stated that the panchas have turned hostile and they do not support the case of the prosecution; while the Police personnels have come forward with cross cutting says with regards to the placement of the slips or affixation thereof. Such discrepancies raise a reasonable doubt; and the possibility that after the alleged seizure, the mudammal was tampered with or a design was hatched to rope in the appellant cannot be ruled out.

5. There is one more circumstance on record which fortifies our conclusion. According to the Police Officer Mr. Bhandari, immediately after the opium was seized, the same was placed in the canister and was then sealed and in the sealed condition, it was taken to the police station along with the appellant, where the canister in the sealed condition was given to the Writer Constable. The Writer Constable who received the sealed bag did not open the same. In view of the fact it was difficult for him to see what was kept in the bag. He then prepared the mudammal receipt produced at Exh.1, wherein he has categorically stated that 10 gram opium of the value of Rs. 100/- placed in plastic sheet (paper). How he came to know is not elucidated. He may come to know on the basis of the FIR lodged or on the basis of the panchnama, or from the officers taking search and seizing the goods but that is not the case of the

prosecution. In the absence of any clarification, it can be said that the pocket was again opened and thereafter before the same was sent to the Laboratory, sealed again. This procedure, if at all, was followed, the same ought to have been undergone in the presence of panchas, but that is not done and reasons thereof are not given. Such circumstance therefore raises a doubt about the bona fides of Investigating Agency and possibility of tampering with the mudammal and sending something else than was seized from the appellant so as to rope in wrongly cannot be denied. In view of the facts, the doubt about the identity of the mudammal, that arises ought to have been removed by the prosecution, but it is not so done. It is not clearly established that the opium alleged to have been seized from the possession of the appellant was sent to the laboratory, the same was examined by the Laboratory, report produced on record is the report relating to that opium and none else. When identity of the mudammal is not established, the report of the FSL produced on record cannot be taken into account and the same has to be kept out of consideration. If that is done, there is nothing on record to hold that the substance found from the possession of the appellant was nothing else but opium.

6. Of course, the Police Officers have stated that on the basis of smell they realized that the substance they found from the possession of the appellant was nothing else but opium. Their such say cannot be accepted. It is not shown that they had undergone the training to identify the object or substance or thing on the basis of smell, and can leaving no doubt distinguish the things. Admittedly, no evidence about training having taken is led. In view of the matter the prosecution has not established in clear terms that the substance seized from the possession of the appellant was opium and nothing else. The learned Addl. Sessions Judge was in our view not right in convicting and sentencing the appellant, as identity of mudammal is not established. On this ground alone, the conviction and sentence inflicted, are required to be quashed and set aside allowing the appeal.

6. For the aforesaid reasons, the appeal is allowed. The judgment and order of the learned Addl. Sessions Judge, Nadiad dated 28.02.1995 rendered in Sessions Case No. 19 of 1994, convicting and sentencing the appellant aforesaid are hereby quashed and set aside and the appellant is acquitted thereof. He be set at liberty forthwith if no longer required in any other case. Fine if paid be refunded.

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p.n.nair